

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILIP H. MCCARVER,

Defendant-Appellant.

UNPUBLISHED

February 5, 2004

No. 241600

Wayne Circuit Court

LC No. 01-8195-01

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to 108 months to 25 years' imprisonment for the armed robbery conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the trial court committed an error requiring reversal by making a statement during jury selection that could be interpreted by the jurors as completely foreclosing the possibility of having testimony reread during deliberations. We disagree.

Defendant has not preserved this issue for review because he did not object below to the challenged statement. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). We review unpreserved, nonconstitutional claims using the plain error doctrine. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error doctrine, a defendant must demonstrate the existence of a clear or obvious error that affected the outcome of the proceedings. *Id.* The reviewing court should reverse only if the defendant is actually innocent or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764; *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

The trial court stated the following at the start of jury selection:

And can everybody see my Court Reporter, Ms. Scott, she's typing on that machine, can everybody see that[?] It's very important that you see that. What's being taken down is in shorthand version, a record of everything that's being said in the courtroom.

Everybody understand that?

(Positive response from the potential jurors.)

It's not a transcript for the jury. Its [sic] not for you. You get your information by listening to the testimony of the witnesses and examining the exhibits, right, remember I told you that, right? When you go to deliberate, don't knock on the door and say hey Judge I forgot everything you said after you said good morning, so you could send a transcript in to me so I can catch up. See, you can't do that.

Everybody understand that?

(Positive response from the jurors.)

Defendant claims that these remarks had the effect of improperly preventing the jury from requesting to review testimony during deliberations. A trial court has the discretion whether to allow a jury to reexamine selected testimony. MCR 6.414(H); *Carter, supra* at 218; *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). The court cannot simply refuse to grant a jury's reasonable request to review certain testimony or evidence, but must exercise its discretion to assure fairness and to grant reasonable requests while refusing unreasonable requests. MCR 6.414(H); *Howe, supra* at 676. The court may order the jury to continue deliberations without the requested review, provided that the possibility of having the testimony reread at a later time is not foreclosed. MCR 6.414(H).

To the extent that the trial court may have given the jury the impression that any review of testimony was completely foreclosed, the court erred. However, we cannot agree that any potential error was *clear or obvious*. See *Carines, supra* at 763. Indeed, a reasonable alternative inference from the trial court's remarks is that they constituted an admonition to the jury at the outset of the case that the jury must closely follow the trial testimony.

Moreover, defendant bears the burden of demonstrating that any error affected the outcome of the trial. *Id.*; see also *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607(1999). He did not meet this burden. Because the challenged remarks were made during jury selection, before trial began, and not at the time of final jury instructions or after a request to have certain testimony reread, and because there is no indication that the jury ever wished to review testimony, there is no indication that the remarks affected the outcome of the proceedings. Reversal is unwarranted. See *Carines, supra* at 763.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter